Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

Term, 2002

SUSAN M. WEICHERT,

Petitioner,

against

WILLIAM J. BROUSE, Treasurer of County of Oswego,

Respondent.

On Appeal from the Court of Appeals
State of New York

PETITION FOR WRIT OF CERTIORARI

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31PP

QUESTIONS PRESENTED

1. Whether Petitioner was deprived, in the Court below, of rights protected by the due process clause of the 5th and 14th Amendments to the United States Constitution and New York Constitution, Article 1 §6.

2. Whether the judgment of the lower court, dated May 30, 2000 was in violation of Mennonite Board of Missions v. Adams, 462 US 791, 77 L.Ed. 2d 180, 103 S.Ct. 2706 (1983) and the 14th Amendment to the United States Constitution.

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LIST OF ALL PARTIES TO THE PROCEEDING.

1. Bert F. Halderman, Esq., of Counsel to Susan M. Weichert,, Pro Se, Petitioner.

2. Bruce N. Clark, County Attorney for William J. Brouse, Respondent.

OPINIONS BELOW

There was no formal opinion rendered in the New York State Court of Appeals. Its *per curiam-affirmed* decision and mandate are reproduced in appendix A and B respectively to this petition, and no official and unofficial reports of opinions were delivered in the case by other courts or administrative agencies.

JURISDICTION

1. Date of entry of judgment or entry to be reviewed is January 10, 2002. The date of judgment of the Court of Appeals is within 90 days of the filing of this appeal, pursuant to Rule 13 of the Rule of Supreme Court.

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"...nor be deprived of life, liberty or property, without due process of law,...".

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

NEW YORK CONSTITUTION, ARTICLE 1 §6.

"No person shall be deprived of life, liberty, or property without due process of law".

STATEMENT OF THE CASE

On or about September 5, 1998, the respondent herein, commenced a prior proceeding in the Supreme Court of the County of Oswego entitled, "Treasurer of the County of Oswego vs. Weichert, et al", Index Number 98-1399, which was an Article 11 foreclosure proceeding and involved one of the real properties at issue herein, 7444 Main Street, Parish, New York. In that prior proceeding, a settlement and stipulation was entered into, allowing petitioner to make payment of all delinquent taxes on that property.

On September 28, 1998; December 30, 1998; February 16, 1999; and March 2, 1999, petitioner offered and tendered payment to respondent for full payment of all delinquent taxes due on the aforesaid property. The letters attached as exhibit "A" to the complaint herein document the truth and veracity of the aforesaid allegation.

On each of the aforesaid dates the respondent refused to

accept payment of the taxes and to mark his records as fully satisfied. As a result thereof, and in accordance with the New York General Obligations Law, there was a full accord and satisfaction of all of the delinquent taxes.

Respondent threatened to sell the aforementioned real property at public auction on October 14, 2000 as a part of the Oswego County tax auction. Because petitioner had no adequate remedy of law, or otherwise, for the irreparable harm and damage done or threatened to be done by the respondent, and because any such sale might contravene prior or future orders of the court, and might divest petitioner of her property without due process, and because the respondent had deeded the aforementioned described real property to the County of Oswego, which said deed contained false recitations , as mentioned in ¶¶10,11 and 12 of petitioner's complaint herein, petitioner filed with the Oswego County Clerk on September 11, 2002, an application for an order to show cause, a summons with

notice, and a verified complaint. At that same time, petitioner purchased and paid for an index number, #00-1692 and RJI, #37-00-0461, as documented by the receipts issued therefore and th. time stamp on the copies given to petitioner. Thereafter, on September 13, 2000 (August is a typographical error), the Honorable John J. Elliott, AJSC, signed and executed the aforementioned order to show cause. That order to show cause, summons with notice and verified complaint were served on respondent and his attorney, Bruce N. Clark September 18, 2000, which said affidavits were filed with the Oswego County Clerk. Respondent served a verified answer on September 26, 2000.

On the return of the order to show cause September 22, 2000, the lower court (Hon. Robert J. Nicholson, JSC) dismissed the order to show cause and complaint, on the grounds that none of the aforementioned pleadings had been filed with the Oswego County Clerk under the index

number issued, nor were they filed at the time of the service upon respondent. This was an erroneous finding.

The Oswego County Clerk's policy is to refuse the issuance of an index number and RJI unless all original papers are filed with the Clerk at the time of the application for index number and RJI.

Respondent and his attorney, Richard C. Mitchell, refused to sign the stipulation settling the record on appeal, forcing petitioner to bring on a motion to settle the said record. Petitioner alleged that such refusal was devious and malicious enough to warrant sanctions; that respondent and his attorney, the County Attorney for the County of Oswego, knew or should have known of the procedures and policy of the Oswego County Clerk's Office, that no receipt for an index number and RJI would be issued by the Oswego County Clerk without first filing of all the original papers, application for index number, and application for RJI, fully and accurately filled in and in quadruplicate, to

be indexed and filed as a civil action and forwarded to the Supreme Court Clerk's Office. This was also known by the lower court because Judge Nicholson was prior County Attorney.

Thereafter, petitioner appealed to the Appellate Division, Fourth Department, which appeal was denied by their order of November 9, 2001.

Thereafter, petitioner appealed to the New York State Court of Appeals for the Second Circuit, which was denied by their order of January 10, 2002. Petitioner submits that these decisions were the result of the parochial nature of these courts and deprived petitioner of due process, as well as confiscation of her $5,500.00 down payment, paid at the tax sale. And $10,000.00 taxes paid, under protest, after an accord and satisfaction of those taxes.

PETITION OF CERTIORARI-

INTRODUCTORY PARAGRAPH

The petitioner, Susan M. Weichert, respectfully prays that a writ of certiorari issue to review and summarily reverse the mandate and decision of the New York State Court of Appeals filed January 10, 2002, the highest court of that state in which a decision could be had, where is drawn in question the validity of the interpretation of the United States Constitution and in particular, the Fifth and Fourteenth Amendments of the United States Constitution, and New York Constitution, Article 1 §6.

ARGUMENT

That the order to show cause signed by the Honorable John J. Elliott, AJSC, on September 13, 2000 and the underlying summons and complaint with exhibits annexed, were filed with the Oswego County Clerk under the above referenced index number on September 11, 2000; affidavits of service were filed at the time of service upon respondent and that the lower court obtained in personam jurisdiction over said respondent and subject matter jurisdiction of this case. Lower court erroneously dismissed this action.

Richard C. Mitchell, attorney for respondent is a Deputy County Attorney for the County of Oswego. His superior, Bruce N. Clark, also listed as attorney for respondent, is the County Attorney. Both have formulated and implemented, as attorneys for the Oswego County Clerk, the procedures and policy of that office which said policy requires that no receipts for an index number or RJI, would be issued by the Oswego County Clerk without first filing of all of the

original papers, application for index number, and application for RJI fully and accurately filled in, and in quadruplicate, to be indexed and filed as a civil action and forwarded to the Supreme Court Clerk's Office.

The receipts issued by the Oswego County Clerk, the time stamp on the order to show cause, all clearly show and indicate that petitioner did file and record the application for the order to show cause, together with supporting papers, the Supreme Court summons with notice, and the verified complaint with the Oswego County Clerk on September 11, 2000. The accusation by Mr. Mitchell and the affidavit of Oswego County Clerk, George J. Williams, indicating that there were no pleadings filed under the above referenced index number is ludicrous and beyond comprehension. They clearly know protocol and procedures of the Oswego County Clerk's Office. A review of the receipts issued and the affidavits of service clearly show that the filing fee was paid, that the original papers were filed

and they were thereafter served. Petitioner cannot be held responsible for the loss of any original papers after they are filed and received by the Oswego County Clerk, and in the hands of the Combined Court system or their agents. At the very least, the lower court should have reconstructed any missing papers from petitioner's and respondent's files; should have investigated the whereabouts of the original papers filed, and of the circumstances of their disappearance while in the hands of the Combined Court system. Petitioner is not responsible or accountable for the judicial system, nor has any control over the delivery of files therein. Petitioner documents that the original papers were filed, the appropriate fees paid, the possession thereby of the court and the service of process thereof.

The General Obligations Law of the State of New York, §15-503(1) requires that a full accord and satisfaction accrued as to any taxes due the County of Oswego and respondent herein.

Petitioner documents that on at least four occasions, she tendered payment to respondent who refused to accept the amount stipulated to in the prior foreclosure proceeding. As a result of that accord and satisfaction, petitioner was not a disqualified bidder at the subsequent tax auction of October 16, 1999. New York Obligations Law §15-503(1); NY Jur 2d 19A Compromise, Accord and Release §1. She should not have been denied two deeds as the successful bidder on two parcels of property listed as catalog #2089-458, 2089-463. The respondent received $5,700.00, in full, and is presently holding those proceeds and converted that amount to Oswego County's use, without due process, in violation of V and XIV Amendments of the United States Constitution and New York Constitution, Article 1 §6.

Respondent's reason for refusing to convey the tax deeds for the two parcels was arbitrary, frivolous, unwarranted and without merit because of the allegations set forth in ¶4,5 and 6 of her verified complaint.

The ex-parte judgment of the lower court dated May 20, 2000 was in violation of Mennonite Board of Missions v. Adams, 462 US 791, 77 L.Ed. 2d 180, 103 S.Ct. 2706 (1983) requiring notice to be given by the County, respondent, to all prior deed owners, lien owners, occupants and such interested parties before selling the real property at a public tax sale. Notice is required to comply with minimal standards of due process as provided by the Fourth Amendment to the United States Constitution. Respondent failed to comply with the aforementioned mandate.

The Supreme Court of Oswego County has visited the subject of this case before (1876-CA 00-01597), Index #00-72. However, in that action, the lower court decided that petitioner had a claim against respondent and dismissed the proceedings in behalf of petitioner's husband, Robert M. Weichert, on the grounds that the claim belonged to petitioner.

That the questions presented herein concerning the

United States Constitution were raised in the lowest court below and preserved on all appeals throughout, but were rejected because of the parochial nature of those courts.

CONCLUSION

The lower court erred in dismissing the order to show cause and complaint herein. This matter should be remanded back to the Supreme Court, Oswego County, with a direction that this action be restored; that any monies paid to respondent be repaid and restored to petitioner, with interest, costs and/or sanctions; that respondent be ordered and directed to convey two tax deeds to petitioner for the two parcels mentioned herein; and further, that an inquest be directed to be held to determine the extent of petitioner's damages that she has suffered as a result of respondent's refusal to convey those two deeds and the deterioration of the properties as a result thereof.

Respectfully submitted,



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APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held
In the City of Albany on the
Tenth day of January, 2002

Present, Hon. Judith S. Kaye,
Chief Judge, presiding.

4-10 Mo. No. 1353
Susan M. Weichert,
Appellant,
v.
William J. Brouse, &c.,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

1218
PRESENT: PINE, J.P., HURLBUTT, SCUDDER, KEHOE AND GORSKI, JJ.

CA-01-01193
SUSAN M. WEICHERT, Plaintiff-Appellant,

v.

WILLIAM J. BROUSE, Treasurer of County of Oswego, Defendant-Respondent.

Susan M. Weichert, having appealed to this Court from the Order of the Supreme Court, entered in the Oswego County Clerk's Office on November 15, 2000, and said appeal having been submitted by Bert F. Halderman, of counsel for plaintiff-appellant, argued by Richard C. Mitchell of counsel for defendant-respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the Order so appealed from be and the same hereby is affirmed without costs.

Memorandum that is hereby made a part hereof.

All concur, Hurlbutt, J. not participating.

Entered: November 9, 2001

CARL M. DARNELL, Clerk

Supreme Court
Appellate Division,
Fourth Department
Clerk's Office, Rochester, NY

I, CARL M. DARNELL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this December 4, 2001.

CARL M. DARNELL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

(1218) CA 01-01193. (Oswego Co.) –Susan M. Weichert, Plaintiff-Appellant, v. William J. Brouse, Treasurer of County of Oswego, Defendant-Respondent.

Order affirmed without costs.

Memorandum: Supreme Court properly dismissed the complaint for lack of personal and subject matter jurisdiction. "[S]ervice of process without first * filing the initiatory papers is a nullity, the action *** never having been properly commenced" (Matter of Gershel v. Porr, 89 NY2d 327, 330; see, Matter of Fry v. Village of Terrytown, 89 NY2d 714, 719-720).**

All concur, Hurlbutt, J., not participating. (Appeal from Order of Supreme Court, Oswego County, Nicholson, J.-Dismiss Pleading.) PRESENT: PINE, J.P., HURLBUTT, SCUDDER, KEHOE AND GORSKI, JJ. (Filed Nov. 9, 2001.)

At a Motion Term of the Supreme Court of the State of New York, County of Oswego, held at the Oswego County courthouse, 25 East Oneida Street, Oswego, New York on September 22nd, 2000.

PRESENT: Hon. Robert J. Nicholson, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OSWEGO

Susan M. Weichert,
Plaintiff,

v.

ORDER
Index No. 00-1692
RJI No. 37-00-0461

William J. Brouse, Treasurer of the County of Oswego,
Defendant.

This matter having come before this Court by virtue of an Order to Show Cause signed by the Hon. John J. Elliott, A.J.S.C. on August 13th, 2000 and the underlying Summons and Complaint, with exhibits annexed, seeking to enjoin and restrain the Defendant from selling certain tax parcels (catalog numbers 4601-257, 2089-458 and 2089-463) and to remove same from the auction list and to stay all tax

foreclosure proceedings as regards parcel number 4601-257 in the Town of Parish, New York; and Defendant William J. Brouse, Treasurer, through his attorney, having duly interposed an Answer with affirmative defenses and exhibits contained therein, including an affidavit from Oswego County Clerk George J. Williams, sworn to September 20th, 2000, and indicating that there are no pleadings filed under the above referenced index number;

NOW, upon review of the foregoing papers and submissions, and upon Susan M. Weichert, Plaintiff, having appeared by Bert F. Halderman, Esq. and having been heard in support of the Order to Show Cause and underlying papers, and Richard C. Mitchell, Esq., Assistant County Attorney, having personally appeared and been heard in opposition thereto on behalf of the Defendant, and it appearing to the Court that none of the aforementioned pleadings have been filed with the Oswego County Clerk under the above-referenced index number, nor were they

filed at the time of the service of same upon Defendant as is a substantive and necessary condition precedent to the exercise of judicial authority, and it further appearing to the Court that in *personam* jurisdiction over the Defendant and subject matter jurisdiction are, accordingly, absent, and due deliberation having been had thereupon;

NOW, it is hereby:

ORDERED, that the within Order to Show Cause and Complaint are hereby dismissed, in their entirety, without prejudice.

Signed: November 9, 2000.
Oswego, New York

ENTER;

_____

Hon. Robert J. Nicholson
Justice of the Supreme Court